IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. ——

BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL NO. 993, JOSEPH A. WAGNER AND WADE RUSSELL

Petitioners

vs.

McLEAN DISTRIBUTING COMPANY, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Minnesota

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vs.

MCLEAN DISTRIBUTING COMPANY, INC.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Minnesota

Petitioners pray that a Writ of Certiorari issue to review the order and judgment of the Minnesota Supreme Court for the granting of a peremptory Writ of Mandamus, issued on February 18, 1959, final judgment being entered March 9, 1959.

OPINIONS BELOW

The opinion of the District Court for the County of Ramsey, as embodied in its Findings of Fact and Conclusions of Law, is unrecorded and is printed in Appendix A, *infra*, pp. 14-17. The opinion of the Minnesota Supreme Court is reported in 94 N. W. 2d 514 (March 4, 1959 advance sheet), and is reprinted as Appendix B, *infra*, pp. 18-43.

JURISDICTION

On December 1, 1958, respondent brought action to obtain injunctive relief from a peaceful strike and picketing being conducted by the petitioning union (T. 1-8). The district court dismissed for lack of jurisdiction (App. A, pp. 16-17). On December 13, 1958, respondent-employer petitioned the Minnesota Supreme Court for a peremptory writ of mandamus to require the District Court of Ramsey County to exercise jurisdiction and decide the action brought by respondent on the merits (T. 152-156). Pursuant thereto, the Supreme Court on the same date issued an order directed to the District Court to show cause why respondent's request for relief should not be granted (T. 157-158).

Oral arguments and briefs were submitted to the Supreme Court on the issue of jurisdiction and on January 23, 1959, the Supreme Court handed down its opinion directing that said writ of mandamus be issued as prayed for. A timely application for rehearing was filed on February 2, 1959 (T. 189) and denied on February 18, 1959 (T. 215). The peremptory writ of mandamus was issued by the Supreme Court on February 18, 1959 directing the District Court to take jurisdiction and decide the issue (T. 216), final judgment being entered in the Supreme Court on March 9, 1959 (T. 217).

Since the judgment appealed from is one emanating from the original jurisdiction of the Minnesota Supreme Court, by way of an extraordinary writ issued to a lower court, the judgment entered above is final for the purposes of *28 U. S. C.*, Sec. 1257(3), under which statute the jurisdiction of this Court is invoked. The judgment appealed from is completely insulated from all proceedings of the

lower court; the respondent did not appeal from any action taken by the lower court, but rather requested that the Minnesota Supreme Court take original jurisdiction over the proceeding by way of mandamus. For authority from this Court that the writ of mandamus proceeding is a distinct suit and the judgment disposing of it a final one for purposes of petitioning for certiorari, see *Bandini Petroleum Co. v. Superior Court of California*, 284 U. S. 8, 14 (1931); *State of Missouri, ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*, 266 U. S. 200, 206-207 (1924); *Detroit & Mackinac Railway Company v. Michigan Railroad Commission*, 240 U. S. 564, 571 (1916). *Cf. Montgomery Building & Construction Trades Council v. Lidbetter Erection Co.*, 344 U. S. 178, 181 (1952) (dissenting opinion).

QUESTIONS PRESENTED

The questions presented are:

1) Can a state court take jurisdiction to determine by injunction proceedings whether a union has purportedly violated a state labor act by striking and picketing during the life of a contract containing a no-strike clause when, at the same time, such strike conduct is regulated by the National Labor Relations Act, as amended, which Act also provides dual remedies to the employer.

2) Can a state court, for the purpose of deciding whether a union purportedly violated a state labor act by striking in violation of contract, determine whether a new group of employees constituted a separate bargaining unit under the National Labor Relations Act, as amended, when that Act grants sole power of decision to the National Labor Relations Board.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are:

1. *61 Stat.* 140, *29 U. S. C.*, Sec. 158(a)(5):
2. *61 Stat.* 140, *29 U. S. C.*, Sec. 158(d)(1) and (4):
3. *61 Stat.* 143, *29 U. S. C.*, Sec. 159(b):
4. *61 Stat.* 156, *29 U. S. C.*, Sec. 185 (Sec. 301(a) and (b) of the Act):

These United States statutes are set out as Appendix C, pp. 45-47.

The pertinent provisions of the Minnesota Labor Relations Act are:

1. *Minn. Stat.* (1957), Sec. 179.11(1):
2. *Minn. Stat.* (1957), Sec. 179.14:

These Minnesota statutes are set out as part of Appendix D, pp. 48-49.

STATEMENT

The petitioning union, Local 993, is the duly certified bargaining agent for those employees of respondent who are drivers and helpers, and said union has a collective bargaining contract with the respondent which was in full force during the events described[1] (T. 48. The contract is set out in full, T. 17-23). Prior to November 7, 1958, McLean was a distributor in the City of St. Paul for various brands of beer (T. 66-66A), and at the same time

[1] Petitioner is hereinafter referred to as "the union" and respondent as "McLean".

the Theo. Hamm Brewing Company, the predominant local brewery, distributed its own beer by trucks owned by it and driven by its employees (T. 58), for which employees this petitioning union was also the duly certified bargaining agent under a *separate contract* with the Hamm Brewing Company, about which contract McLean knew (T. 81). The Hamm contract was more favorable in terms to the employees than the McLean contract (T. 167).

On November 7, 1958, the Hamm Brewing Company discontinued distribution of its own beer and entered into an agreement with McLean for the distribution of Hamm's Beer (T. 67). Hamm's terminated the employment of 64 drivers and helpers; 48 of these terminated Hamm employees were then immediately hired by McLean (T. 80), which addition to the work force quadrupled McLean's number of employees, McLean employing only 15 to 16 drivers and helpers prior to taking on the distribution of Hamm's Beer (T. 75). All of the necessary Hamm's delivery trucks were sold to a McLean affiliated corporation and then used by McLean to deliver Hamm's beer (T. 74).

The union immediately requested that McLean bargain with it concerning the creation of a separate bargaining unit for the former Hamm's employees now employed by McLean as to separate wages and working conditions concerning said employees, the union contending that the McLean contract did not cover these employees (T. 105-106). McLean refused to bargain, claiming that its contract with the union covered all of its employees and automatically included the former Hamm's employees within it (T. 33, 85, 92).

The McLean-union contract provided for grievance and arbitration during the life of the contract and that there

would be no strike or lockout during the period provided for arbitration (T. 21, App. B. pp. 20-21).

Upon McLean's refusal to bargain, the union, after a strike vote (T. 65), struck and picketed McLean on December 1 (T. 71). No notice was given to either federal or state conciliation offices.

McLean immediately commenced an action for injunctive relief on the ground of an alleged violation of the Minnesota State Labor Relations Act, particularly Sections 179.11(1) and 179.14 of the *Minnesota Statutes* (1957). In essence, these two statutes declare that it is an employee unfair labor practice to strike in violation of a collective bargaining agreement if the employer is in good faith complying with the contract. Injunctive proceedings, including an ex parte restraining order, may be commenced by the employer to restrain and enjoin an unfair labor practice (App. D, pp. 48-49).

On motion of McLean, the trial court (District Court for the County of Ramsey) issued an ex parte restraining order prohibiting the picketing until the matter could be heard on McLean's motion for a temporary injunction (T. 7-8).

At the hearing on the temporary injunction, a written stipulation was entered into between petitioner and respondent under which McLean admitted that it was engaged in interstate commerce within the meaning of the National Labor Relations Act (T. 15-16).

On December 12, the trial court made findings of fact and concluded that the state court lacked jurisdiction because the controversy was governed exclusively by the National Labor Relations Law (App. A, pp. 16-17).

McLean then obtained a show-cause order from the Min-

nesota Supreme Court why a peremptory writ of mandamus should not be issued requiring the trial court to accept jurisdiction and to proceed to try the action on the merits (T. 157-158).

On January 23, 1959, the Supreme Court of the State of Minnesota decided that the state court did have jurisdiction over the subject matter and directed that a peremptory writ of mandamus issue, compelling the State District Court to take jurisdiction and decide the matter on the merits (T. 164-186).

HOW FEDERAL QUESTION RAISED

The union first raised a federal question in paragraph III of its answer to McLean's complaint, when the union alleged that the dispute was within the exclusive jurisdiction of the Federal Act (T. 9). At the hearing before the trial court, the union again raised the federal question by moving the court to dismiss the proceedings on the ground of exclusive jurisdiction under the Federal Act (T. 42).

In the Minnesota Supreme Court the union raised the federal question in its answer to McLean's petition for mandamus by answering that the state court was without jurisdiction (T. 163). The Supreme Court considered that argument at length, but rejected the union's contention, holding that: (a) Sec. 8(d) of the Federal Act, *29 U. S. C.*, Sec. 158(d), as interpreted by *N. L. R. B. v. Lion Oil Co.*, 352 U. S. 292 (1957), does not prevent a state court from taking jurisdiction to enjoin peaceful strike activity notwithstanding the same is a purported violation of a no-strike agreement (App. B, pp. 30-36) and (b) the state court can decide whether or not there was a separate bargaining

unit according to the Federal Act, and National Labor Relations Board decisions thereunder (App. B, pp. 36-39). Both points obviously raise federal questions of substance.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it erroneously allows injunctive action on the state level over peaceful strikes and picketing as to labor disputes arising out of interstate commerce and concerning conduct which is regulated by the National Labor Relations Act. The state decision is contrary to *Garner v. Teamsters, et al.*, 346 U. S. 485 (1953), holding that a state labor act cannot be used for either complementary or contrary relief where the same conduct constitutes an unfair labor practice under the National Labor Relations Act; it is contrary to *Weber v. Anheuser-Busch*, 348 U. S. 468 (1955), holding that peaceful picketing cannot be enjoined if the same conduct or activity has been regulated by the National Labor Relations Act, even though the state law may have been enacted for a different purpose; it is contrary to the latest decisions of this Court, *Hotel Employees Union Local No. 255 v. Sax Enterprises, Inc.*, — U. S. —; 3 L. ed. 2d 289 (1959) and *Building Trades Council v. Garman*, — U. S. —, decided April 20, 1959, holding that state jurisdiction must yield if the activity in question may arguably be regulated by Sections 7 or 8 of the Federal Act. It is also contrary to *International Union of United Auto, Aircraft and Agricultural Implement Workers of America v. O'Brien*, 339 U. S. 454 (1950), where this Court, in striking down a Michigan strike control law because it infringed upon areas regulated by the National Labor Relations Act, specifically referred to Sec. 8(d) (along with other sections of the Act) in stating:

"None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation." p. 457.

In the instant case, if the union's position is correct that it had the right to strike and picket because the new employees of McLean constituted a separate bargaining unit, and the union was therefore exercising its lowful economis means to achieve a certain standard of working conditions, then the strike and picketing would be protected by Section 7 of the National Labor Relations Act, *29 U. S. C.*, Sec. 157. But if the state court's position is correct on the issue of the new employees being covered by the contract in force between the union and McLean, then the Union's conduct would appear to be prohibited under Section 8(d)(4), *29 U. S. C.*, Sec. 158(d)(4), which is an unfair labor practice under Section 8(a)(5), *29 U. S. C.*, Sec. 158(a)(5).

The issue directly involved in this case is one not heretofore determined by this Court, i.e., the power of a state court to enjoin a supposed breach of a collective bargaining contract. Under the doctrine set forth in *N. L. R. B. v. Lion Oil Co.*, 352 U. S. 292 (1957), this Court clearly determined that the field of strikes involving termination clauses or modification clauses in collective bargaining agreements was conduct that was regulated by Section 8(d). *Minn. Stat.*, Sec. 179.11(1) (1957), declares a strike illegal if it is in violation of a contract and the Minnesota Supreme Court held that this section applied in the instant case and that the state had jurisdiction to enjoin such conduct, its reasoning being:

"* * * there is an area which is not covered by the Federal act in which Congress has not preempted the

> field and in which the state courts are free to act. Among the area left open for the exercise of jurisdiction by the state courts is that of enforcing existing contracts that are not open to negotiation" (App. B, pp. 30-31).

The National Labor Relations Board would not agree, for it has stated that congressional intent was to insist upon adherence to fixed contracts, and to carry out that intent was one of the reasons for the enactment of Section 8(d) of the National Labor Relations Act, as amended. *Lion Oil*, 109 N. L. R. B. 680, 684-5 (1954).

This Court has also recognized the intent of Congress to enforce no-strike provisions by providing a federal forum and federal substantive law for the enforcement of agreements to arbitrate through Section 301 of the National Act, *61 Stat.* 156, *29 U. S. C.*, Sec. 185. *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U. S. 448 (1957).

By the force of the instant decision, any state could enjoin an alleged breach of a no-strike agreement, notwithstanding that such activity may be otherwise specifically protected or specifically prohibited under some applicable provision of the National Labor Relations Act. The instant opinion has potential application over a tremendously wide and important segment of labor relations, since eighty-nine per cent of union contracts contain an absolute or conditional no-strike clause. Bureau of National Affairs, *Collective Bargaining, Negotiations and Contracts*, 77:1 (9-7-56). The quest for uniformity in dealing with labor disputes will be decimated by the instant decision and a rush for forum shopping will be the inevitable result, a scramble which this Court has already decried in *Bernhardt v. Polygraphic Co. of America*, 350 U S. 198, 203-204 (1956),

and *Garner v. Teamsters*, 346 U. S. 485, 490-491 (1953).

2. It was and is the union's position that it did not violate any provision of the National Act or the Minnesota State Labor Relations Act in engaging in a peaceful strike and picketing against McLean, notwithstanding the no-strike provision in the McLean-Union contract. This is because the union believes the massive hiring by McLean of the former Hamm's employees constituted an abnormal increase to the work force not contemplated by either party at the time the collective bargaining agreement was entered into by the parties, and that the new employees constituted a new bargaining unit under the applicable decisions of the National Labor Relations Board. Petitioner contends that the state court is without authority to determine whether there is or is not a separate bargaining unit here, since Section 9(b) of the National Act, *29 U. S. C.*, 159(b), vests exclusive authority with the National Labor Relations Board to decide what is an appropriate bargaining unit when it cannot be resolved by the parties themselves. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767 (1947).

If there is a new bargaining unit here, the holding in *Mastro Plastics Corp. v. N. L. R. B.*, 350 U. S. 270 (1956) is sufficiently broad to make the instant union conduct protected activity under the National Act. In *Mastro*, this Court held that a no-strike provision in a collective bargaining agreement did not deprive striking employees of their status as employees by reason of their engaging in a strike to protest an employer's unfair labor practice. So here, McLean refused to bargain and a refusal to bargain is an unfair labor practice on the part of the employer by reason of Section 8(a)(5), *29 U. S. C.*, Sec. 158(a)(5).

Whether the employer had the right to refuse to bargain depends upon whether the new employees were covered by the contract or whether they constituted a separate bargaining unit calling for bargaining as to wages and working conditions. Here, the Minnesota Supreme Court made its own independent decision of whether the new employees of respondent constituted a separate bargaining unit under the decisions of the National Labor Relations Board. Has a state court the power to do this? If, as stated in *Garner v. Teamsters*, 346 U. S. 485, 489 (1953), it is not appropriate for this Court to surmise how the Board would have decided a specific controversy, since the primary duty of decision lies with the Board, it is certainly not appropriate for a state court to make an independent determination of the controversy. Even more indicative of the national policy is this Court's latest decision on this question, *Building Trades Council v. Garman*, decided April 20, 1959:

> "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *."

CONCLUSION

It is our understanding that this Court has ruled that the National Labor Relations Act exclusively regulates conduct such as peaceful strikes and picketing. We see no reason why the rule should be different because that conduct involves alleged violations of no-strike provisions or arbitration clauses in collective bargaining contracts, assuming the requisite interstate business by the employer, and that belief is based on the *Lion Oil* case (no-strike provision), the *Lincoln Mills* case (enforceability of arbitration), and on the preemption principle set forth in *Garner* and later cases.

We therefore request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Lower Court Decision

[Caption omitted]

Findings of Fact and Conclusions of Law

This matter came on for hearing on the plaintiff's motion for a temporary injunction on Dec. 8th, 1958, a preliminary restraining order having been issued on Dec. 2, 1958. Messrs. Bundlie, Kelley & Maun, by Mandt Torrison, Esq., appeared for the plaintiff, and Messrs. Robins, Davis & Lyons, by Solly Robins, Esq., appeared as counsel for the defendants. Pursuant to the statute, the Court heard evidence presented by the plaintiff, and the testimony being closed on Dec. 10th, 1958. The defendant rested at the close of the plaintiff's testimony without presenting evidence.

The Court makes the following findings:

Findings of Fact

I.

That for a considerable time prior to the occurrence of the events giving rise to this controversy the plaintiff was engaged in the business of selling and distributing beer, and soft beverages to customers in and about St. Paul, and in said business used trucks and employed truck drivers and others. That the defendant Union was the duly certified bargaining agent of the plaintiff's employees.

II.

That on or about July 1st, 1957 the plaintiff and the defendant Union duly entered into a contract covering the matter of employment, the terms thereof, wages and in

general fully covering all relations between the plaintiff and its employees. That said contract by its terms remains in effect until June 30th, 1959, and was in full force and effect at the time of the occurrence giving rise to this controversy.

That said contract covered fully the relations between the plaintiff and its employees in the employment at the time of the execution of the contract, and also all new or additional employees who might be employed during the term of the employment.

That among other things said contract provided for the arbitration of disputes, and that there should be no strike during the period provided for arbitration.

III.

That prior to Nov. 7th, 1958 the Hamm Brewing Co., distributed its product in St. Paul, owning trucks and employing truck drivers, helpers and others in that operation. That on Nov. 7th, 1958 the plaintiff entered into an agreement with the Hamm Brewing Co., under which the plaintiff became the distributors of the Hamm Co., products in St. Paul. That thereupon the Hamm Co., sold its delivery trucks to a corporation affiliated with the plaintiff, terminated the employment of approximately sixty-four persons who had been employed in connection with the delivery of Hamm's Beer in St. Paul, and the plaintiff, on Nov. 10th, 1958, commenced operations as distributor of Hamm's Beer in St. Paul, on that date the plaintiff employed approximately forty-eight of the men who had previously been employed by the Hamm Co. That the Hamm Co., and the defendant Union also had a contract in force covering the employment of truck drivers and others engaged in the distribution of beer by the Hamm Co.

IV.

That a controversy then arose between the plaintiff and the defendant Union; the plaintiff claiming that pursuant to the terms of the contract between the plaintiff and the defendant Union the employment of the men formerly in the employ of the Hamm Co., was covered by and was within the terms of the contract existing between the plaintiff and the defendant Union, and the defendant Union claiming that the situation amounted to an assumption by the plaintiff of the contract between the Hamm Co., and the defendant Union.

That no request for arbitration of said dispute was made by either party.

V.

That on or about Dec. 1st, 1958 the defendant Union held a meeting, from which were barred all employees of the Union who had been employees of the plaintiff prior to the employing of the former Hamm Co., drivers, and a vote was taken favoring a strike, and the strike was thereafter ordered, and pickets were placed at the plaintiff's places of business.

VI.

That a substantial portion of the plaintiff's business is interstate in character. As

Conclusions of Law

The Court finds and orders that the controversy between the parties herein is one governed by the provisions of the National Labor Relations Law, and that this Court is without jurisdiction to grant an injunction upon the facts now before the Court, and it is further ordered that the

plaintiff's motion for a temporary injunction is denied, and the restraining order heretofore entered is vacated.

Dated Dec. 12, 1958.

Arthur A. Stewart,
District Judge.

APPENDIX B

Minnesota Supreme Court Decision

[Caption omitted]

Syllabus

1. Where a trial court has jurisdiction over a controversy but declines to exercise such jurisdiction, mandamus is a proper remedy to compel it to take jurisdiction and determine the controversy on the merits if there is no other adequate remedy.

2. The courts of this state are not precluded from exercising jurisdiction over a controversy involving the legality of a strike in contravention of an express no-strike clause in a labor contract, even though the contract involves employment affecting interstate commerce, if the contract contains no provision for reopening or renegotiation during the express term thereof.

Let the writ issue as prayed for.

Opinion

Knutson, Justice.

This is a petition for a peremptory writ of mandamus to compel the District Court of Ramsey County to take and exercise jurisdiction in an action brought to obtain injunctive relief from an alleged unauthorized and illegal strike.

The principal facts are not seriously in dispute. Relator, McLean Distributing Company, Inc., referred to hereinafter as McLean, has been engaged for a number of years in the business of selling and distributing various brands of beer and soft drinks in and near the City of St. Paul. These brands have varied from time to time. McLean is a

wholesaler in that it buys the products of various manufacturers and resells them at a marked-up price. Deliveries of such products are made by truck. Respondent Brewery and Beverage Drivers, Warehousemen and Helpers Union, Local No. 993, referred to hereinafter as the respondent union, is the duly certified bargaining agent for McLean's employees.

On or about July 1, 1957, McLean and respondent union negotiated and executed a contract covering the working relations between McLean and its employees, which by its terms expires on June 30, 1959. While this contract was executed separately by McLean, it is identical with that executed with other distributors of like products in the same general area. The pertinent portions of this contract are:

> "*Section 1. Recognition as Bargaining Agent.* The Employer recognizes the Union as the sole collective bargaining agent for the employees in the classifications covered by this agreement as certified by the National Labor Relations Board.
>
> "*Section 2. Union Shop.* The Employer shall have the right to choose any person as a new employee. All employees now within the unit who have been employed for thirty (30) days or more, and all other employees after thirty (30) days of employment, shall become members of the Union and shall thereafter maintain membership in good standing as defined by the National Labor Relations Act as a condition of continued employment.
>
> "*Section 3. Union Assistance in Securing New Employees.* The Union agrees to prepare and main-

tain a list of men available for hire who possess the necessary qualifications to employment, and shall furnish the same and such additional information relative thereto as it has available if any employer requests it.

* * * * *

"*Section 5. Contract Provisions Controlling.* No agreement between Employers and employees conflicting with the terms and provisions hereof shall be valid and enforceable.

"Both the Employer and the Union will be bound by the terms hereof during the period set forth herein regardless of any claimed collateral agreements or understandings unless such amendments or modifications are made a part hereof by express written stipulation and in the event any question arises of adherence to the provisions of this agreement, no contract, or understanding between the Employers and the employees shall prevail as against the provisions of this agreement.

"No employee covered by this agreement shall have the right to vary the terms or provisions hereof without the express written consent of the Union and the Employer.

* * * * * *

"Article VI.

"*Grievance and Arbitration*

"Any controvery arising over the interpretation of or adherence to the terms and provisions of this agreement shall be settled promptly by negotiations between the Employer and the employee or a Union rep-

resentative, provided if negotiations are with an employee, the bargaining representative of the Union has been given an opportunity to be present. If no adjustment satisfactory to both parties can be reached in this way, then the matter shall be settled by a Board of Arbitrators upon written demand of either party upon the other within ten (10) days of the occurrence of the dispute.

"[Thereafter follow specifications as to the manner in which the arbitration shall be conducted.]

* * * * *

"There shall be no strike or lockout during the period herein provided for arbitration.

* * * * *

"Article XII.

"Effective and Termination Dates

"This Agreement shall take effect as of July 1, 1957 and shall continue in effect until June 30, 1959, inclusive. *This Agreement may be reopened as of July 1, 1959* for changes or modifications herein, or termination hereof, by either party giving sixty (60) days advance written notice to the other of its intent to do so. If neither party reopens this contract as herein provided, it shall automatically be extended from year to year thereafter with like provisions for reopening as of the annual date of July 1." (Italics supplied.)

Among other things, the contract provides for seniority rights of employees.

Prior to November 7, 1958, the Hamm Brewing Com-

pany, referred to hereinafter as Hamm's, distributed its own products in the City of St. Paul by trucks owned by it and driven by its employees. Respondent union was the certified bargaining agent for Hamm's employees, as it was for those of McLean. On or about November 7, 1958, Hamm's decided to discontinue distribution of its own products. It then entered into an agreement with McLean under which McLean became the distributor of Hamm's beer in the City of St. Paul. Some or all of the trucks formerly used by Hamm's were sold to a corporation affiliated with McLean. Hamm's terminated the employment of some 64 persons formerly engaged in the sale and distribution of its beer. McLean commenced distribution of Hamm's beer on November 10, 1958. Prior to doing so, it notified the former employees of Hamm's, who had been discharged that they could, if they desired, apply for work with McLean. Some of them did so, and, as a result thereof, McLean employed 48 of Hamm's former employees. They began working for McLean, doing the same work as the original McLean employees. The contract which the union had with Hamm's was more favorable to the employees, in some respects, than the contract which it had with McLean. This may have been due to the fact that Hamm's employees were engaged both as salesmen and distributors whereas McLean conducted the selling operation independently from the distribution. After McLean had hired some of Hamm's former employees, the union contended that McLean was under an obligation to bargain with it separately with respect to working conditions of Hamm's former employees. McLean claimed that it had a contract covering all its employees which was not subject to renegotiation or reopening during its term.

On or about December 1, 1958, respondent union called a meeting of the former Hamm's employees. The original McLean employees were excluded from such meeting. Those attending that meeting voted in favor of going on a strike. Thereafter, McLean's place of business was picketed with signs reading "McLean-Hamms Distr. UNFAIR to Brewery and Beverage Drivers Local 993." McLean's employees were told by the pickets that they could deliver all beer except Hamm's. Drivers who took out mixed loads of beer, including Hamm's beer, were threatened with reprisals such as being blackballed from the union and other injury. None of the former Hamm's employees who had been hired by McLean remained at work. McLean informed them by telegram that they must return to work or they would be replaced. When none of them returned to work, each was notified that he had been discharged. It is claimed that as a result of the picketing McLean has lost all sources of beer for distribution except Hamm's.

On December 2, 1958, McLean commenced an action for injunctive relief, alleging unfair labor practices under M. S. A. 179.06 and 179.11(1, 2, 4, 7, 8).[1] The trial court issued a temporary restraining order prohibiting the picketing until the matter could be heard. In order to obviate the necessity of introducing evidence on that phase of the case, the parties entered into a stipulation that for the purpose of this case it would be admitted that McLean was

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[1] M. S. A. 179.11(1) reads:

"It shall be an unfair labor practice:

"(1) For any employee or labor organization to institute a strike if such strike is a violation of any valid collective agreement between any employer and his employees or labor organization and the employer is, at the time, in good faith complying with the provisions of the agreement, or to violate the terms and conditions of such bargaining agreement;"

engaged in interstate commerce within the meaning of the National Labor Relations Act. A hearing was held, and, after making some findings of fact, the trial court determined that the state court lacked jurisdiction over the controversy and denied any relief. The restraining order theretofore issued was discharged. We then issued a show-cause order on an application for a peremptory writ of mandamus requiring the trial court to accept jurisdiction and to proceed to try and determine the case on its merits and to grant such relief as relator was entitled to.

The principal question now before us is whether, under the facts of this case, the courts of this state may exercise jurisdiction over the controversy involved and grant injunctive relief.

A preliminary question arises as to whether mandamus is available to compel the trial court to accept jurisdiction of the controversy. Respondent union concedes that this court may, by mandamus, compel an inferior court to act where it refuses to do anything but contends that mandamus is not available when the court has acted by determining that it has no jurisdiction. While this argument poses a fine distinction, we think that it lacks substance. The result to a party who faces irreparable harm is the same whether the court decides that it can do nothing and simply refuses to act, without expressing its determination, or if it expressly states that it has no jurisdiction and declines to act. We think that the general rule, as stated in 35 Am. Jur., Mandamus, §254, is the proper one to be followed here. The rule as there stated is:

> "* * * One of the ancient offices of the writ, in fact, was to compel action by lower judicial tribunals. It seems to be thoroughly settled that where a lower court without sufficient reason, neglects or refuses to

act upon a matter within its jurisdiction, properly brought before it, mandamus will issue at the instance of one entitled to invoke the remedy, to compel it to assume jurisdiction and proceed to a determination of the cause, * * * unless the aggrieved party has a remedy by appeal or error which is adequate. But the mere fact that there is a remedy by appeal or error will not preclude mandamus for the purpose of compelling the exercise of jurisdiction where the remedy by appeal or error would be inadequate. *The power by mandamus to compel a subordinate judicial officer to proceed with the trial and the determination of a case which it is his duty to hear and decide includes the power to compel him to reverse an erroneous decision that he will not proceed with such trial and judgment.*" (Italics supplied.)

Our decisions are in accord. In State ex rel. Prall v. District Court, 126 Minn. 501, 503, 148 N. W. 463, the proper use of a writ of mandamus is stated as follows:

"Mandamus is an extraordinary remedy. It is not needed if there is an adequate remedy in the ordinary course of law. Its purpose is not to correct errors and it is not the substitute for an appeal. It will compel judicial action and the exercise of jurisdiction. It will not direct the manner of its exercise or control judicial discretion.

* * * * * *

"We are of the opinion * * * that when there is no discretion in the district court to decline jurisdiction, and the question arises at the commencement of the trial, and the record properly presents the question, mandamus is an appropriate remedy."

In State ex rel. Gresham v. Delaney, 213 Minn. 217, 219, 6 N. W. 2d 97, 98, we reviewed our cases on the subject and said:

> "*Mandamus* will issue to compel judicial officers in the same manner and to the same extent as other public officers to perform duties with respect to which they plainly have no discretion as to the precise manner of performance and where only one course of action is open. *Mandamus* is not a substitute for, and cannot be used as, an appeal or writ of error. Ordinarily, where a party has an adequate remedy by appeal, a writ of *mandamus* should be denied. * * *
>
> "* * * where the duty does not permit the exercise of any discretion with respect to its performance and only one course of action is open and where the aggrieved party does not have an adequate remedy by appeal, *as where the duty is to entertain jurisdiction of an action and the court refuses to do so* * * * the writ will issue; * * *" (Italics supplied.)

Jurisdiction involves the power to decide the controversy.[3] Where jurisdiction is declined, it involves a refusal to act. Except in those cases where the court has a discretionary right to do so, mandamus may be the only way in which a litigant can secure relief that will prevent irreparable harm. In a similar manner, prohibition is available to prevent the unauthorized exercise of jurisdiction.

The evidence in the case before us indicates that McLean has already lost the distribution of all brands of beer except Hamm's as a result of the picketing. Stoppage of distribution of Hamm's beer would involve a loss to McLean of a gross income of about $4,000 per day and of about

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[3] *Swanson v. Alworth*, 159 Minn. 193, 198 N. W. 453.

$12,000 to Hamm Brewing Company. Continued picketing could well destroy the entire business of McLean. Under these circumstances, we do not believe that it can be said that the right of appeal, with its inherent delay in obtaining a decision, would furnish an adequate remedy. On the showing made, we are satisfied that the matter should be disposed of by mandamus.

The same result has been reached by other courts. See, Ex parte Simons, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094; Ex parte Nebraska, 209 U. S. 436, 28 S. Ct. 581, 52 L. Ed. 876; In re Connaway, 178 U. S. 421, 20 S. Ct. 951, 44 L. Ed. 1134; In re Grossmayer, 177 U. S. 48, 20 S. Ct. 535, 44 L. Ed. 665; State ex rel. Happel v. District Court, 38 Mont. 166, 99 P. 291, 35 L. R. A. (N. S.) 1098, 129 A. S. R. 636; State ex rel. McGovern v. Williams, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941; Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827.

We come then to the main issue in the case, namely, whether, under the record we have before us, the state court has jurisdiction to act in the controversy.

As near as we can determine respondent union's position, it is: (1) That when the individuals formerly employed by Hamm's were hired by McLean they had a right to continue to work under the contract executed by Hamm's or to be considered as a separate bargaining unit; or (2) that the National Labor Relations Board had exclusive jurisdiction over the question as to whether respondent union was the bargaining agent for such employees and had a right to bargain for them as a separate bargaining unit for a new contract with McLean.

It seems to us that much of the difficulty in this case

arises from the refusal of respondent union to face the real issue before us. In its brief, respondent union, among other things, says:

> "We deem the following concept fundamental: Federal law precludes state jurisdiction over any alleged unfair labor practice affecting interstate commerce and the N. L. R. B. has exclusive power to deal with such problems, whether or not it has been called upon to exercise that authority."

The weakness of this contention is two-fold. In the first place, the mere allegation of an unfair labor practice, without any evidence to substantiate it, does not establish the alleged fact. In determining whether the trial court has jurisdiction we must take the evidence as we find it in the record before us. It must be conceded that, if the record had established that the dispute involved the unfair labor practice alleged by the union, the National Labor Relations Board would in all probability have exclusive jurisdiction. There are some areas, however, where the state courts have been held to have jurisdiction even though the conduct involved is held to be an unfair labor practice under the Federal act.[3] Aside from these areas, Congress has not preempted the entire field but has left some areas open in which the state courts may exercise jurisdiction.[4] After reviewing many of the cases on this subject, the United States Supreme Court, in International Brother-

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[3] *Cf. International Union U. A. W. v. Russell*, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; *International Assn. of Machinists v. Gonzales*, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018; *43 Minn. L. Rev.* 341.

[4] For note on right of state courts to act when the National Labor Relations Board declines to act, see *39 Minn. L. Rev.* 911; *43 Minn. L. Rev.* 342.

hood of Teamsters v. Vogt, Inc., 354 U. S. 284, 289, 77 S. Ct. 1166, 1169, 1 L. Ed. 2d 1347, 1351, said:

> "* * * These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation."

In International Union, U. A. W. A. v. Wisconsin Board, 336 U. S. 245, 254, 69 S. Ct. 516, 521, 93 L. Ed. 651, 663, rehearing denied, 336 U. S. 970, 69 S. Ct. 935, 93 L. Ed. 1121, the court said:

> "* * * There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned."

While we have not had occasion to pass on the specific question involved here,[5] we have had occasion a number of times to review the decisions of the United States Supreme Court on questions involving the right of our court to act in this field.[6] It would serve no useful purpose to again review them in detail. In Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 99, 46 N. W. 2d 94, 100, we said:

> "The law is now settled that where a case involves a labor dispute in the field of interstate or foreign commerce *covered by the National Labor Management Relations Act*, 1947, the National Labor Rela-

[5] See, *38 Minn. L. Rev.* 776.

[6] For a comprehensive discussion of the subject, see *The Minnesota and National Labor Relations Acts—A Substantive and Procedural Comparison, 38 Minn. L. Rev.* 730.

> tions Board * * * has exclusive jurisdiction and the state courts have none. It is not a question of whether N. L. R. B. has acted or what its action will be, but rather whether congress has asserted its power to regulate that relationship." (Italics supplied.)

McQuay, Inc. v. International Union, U. A. W. 245 Minn. 274; 72 N. W. 2d 81, affirmed, 351 U. S. 959, 76 S. Ct. 1024, 100 L. Ed. 1481, is an illustration of the type of case in which the state courts have been held to have power to act. That case dealt with the exercise of the state's police power in restraining acts of violence in connection with picketing. After dealing with the areas in which Congress has preempted the field and in which the state is precluded from exercising jurisdiction, we said (245 Minn. 278, 72 N. W. 2d 84):

> "* * * the United States Supreme Court continues to rule that congress has not withdrawn from the states the right to act to prevent violence; that congress designedly left open an area for state control, it having manifested no intention thus far to exclude states from exercising their police power."

Thus, it seems clear that, where an act complained of is one that is protected by the National Labor Relations Act, the National Labor Relations Board has exclusive jurisdiction[7] but that there is an area which is not covered by the Federal act in which Congress has not preempted the field and in which the state courts are free to act.

Among the areas left open for the exercise of jurisdiction by the state courts is that of enforcing existing contracts

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[7] In addition to the cases mentioned above, see *Faribault Daily News, Inc. v. International Typographical Union*, 236 Minn. 303, 53 N. W. 2d 36; *State ex rel. International Union, Local 1174 v. Finkelnburg*, 236 Minn. 349, 53 N. W. 2d 128.

that are not open to negotiation. In the enactment of the Taft-Hartley Act a proposal was contained in the Senate version of the act to include breach of contract as an unfair labor practice. This provision was deleted in conference with the observation:

> "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."[8]

In International Union, U. M. W. v. National Labor Relations Board, 103 (App. D. C.) 207, 211, 257 F. 2d 211, 215, the court said:

> "The Board says, rightly, that a strike in violation of an agreement not to strike is an unprotected labor activity the Supreme Court of the United States so held long before there was any legal provision for unfair labor practices by Unions. N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. The Board has frequently so held. See, e. g., W. L. Mead, Inc., 113 N. L. R. B. 1040. Employees who strike in violation of such an agreement may be discharged, with impunity. However, to translate their conduct from an unprotected activity to an unfair labor practice one must find justification in the statute."

A strike in violation of a contract not open to renegotiation during its term is not an unfair labor practice under

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[8] H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess. p. 42; see *Association of Employees v. Westinghouse Elec. Corp.*, 348 U. S. 437, 444, 75 S. Ct. 489, 492, 99 L. Ed. 510, 516, where in footnote 2 the United States Supreme Court said: "The Act expressly defers to state law on the question of legality of the union shop provision. (§§ 8(a) (3), 14(b).)"

the National Labor Relations Act. It is declared to be such under M. S. A. 179.11(1). A number of state courts have held that under conditions such as we have here the state may entertain jurisdiction.[9]

Respondent union also contends that there has been a violation of the National Labor Relations Act, §8(d),[10] which is an unfair labor practice under §8(b)(2); hence, it argues, the National Labor Relations Board has exclusive jurisdiction over the controversy.

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[9] See, *General Bldg. Contractors' Assn. v. Local Union No. 542*, 370 Pa. 73, 87 A. 2d 250; *Philadelphia Marine Trade Assn. v. International Longshoremen's Assn.* 382 Pa. 326, 115 A. 2d 733, certiorari denied, 350 U. S. 843, 76 S. Ct. 84, 100 L. Ed. 751; *General Elec. Co. v. International Union*, 93 Ohio App. 139, 108 N. E. 2d 211, appeal dismissed, 158 Ohio St. 555, 110 N. E. 2d 424; *Anchor Motor Freight N. Y. Corp. v. Local Union No. 445*, 12 Misc. 2d 757, 171 N. Y. S. 2d 506, affirmed, 5 App. Div. 2d 869, 171 N. Y. S. 2d 511; *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322, certiorari denied, 355 U. S. 932, 78 S. Ct. 413, 2 L. Ed. 2d 415.

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[10] *61 Stat.* 142, 29 U. S. C. A., §158(d), provides:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> * * * * *

McLean contends that §8(d) is applicable only to contracts subject to reopening or renegotiation during their term; hence, that it is not applicable here because this contract was not subject to reopening or renegotiation during its term.[11] Both parties rely on National Labor Relations Board v. Lion Oil Co., 352 U. S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331. A close reading of that decision will, we think, support McLean's contention in so far as it deals with our problem at all. The court said in that case (352 U. S. 285, 77 S. Ct. 332, 1 L. Ed. 2d 335):

> "* * * The sole question presented by the petition for certiorari is:
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> "Whether the requirement of this Section is satisfied *where a contract provides for negotiation and adoption of modifications at an intermediate date during its term*, and a strike in support of modification demands occurs after the date on which such modifications may become effective—and after the 60-day notice period has elapsed—but prior to the terminal date of the contract". (Italics supplied.)

It is obvious from that statement of the question presented that the case is of little help here, for this contract contains no provision for reopening, modification or re-

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"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"* * * and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

[11] See, *38 Minn. L. Rev.* 886.

negotiation until its expiration date. Some of the remarks of the court bear repeating here (352 U. S. 290, 77 S. Ct 335, 1 L. Ed. 2d 338):

> "* * * The use of the three words 'termination,' 'modification' and 'expiration' is significant. We conceive that a notice of desired modification would typically be served in advance of the date *when the contract by its own terms was subject to modification.* Notice of desired termination would ordinarily precede the date when the contract would come to an end by its terms or would be automatically renewed in the absence of notice to terminate". (Italics supplied.)

The court then quotes the latter part of §8(d) quoted in the footnote above and says (352 U. S. 290, 77 S. Ct. 335, 1 L. Ed. 2d 338):

> "The negative implication seems clear: Congress recognized a duty to bargain over modifications *when the contract itself conte vlates such bargaining*". (Italics supplied.)

The court, although admitting that the 1948 committee report was no part of the legislative history of the 1947 act quotes from such report the following (352 U. S. 291, 77 S. Ct. 335, 1 L. Ed. 2d 338):

> "Reading section 8(d) as a whole seems to lead to the conclusion that *the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages.* Use of the words 'or modify' and 'or modification' in the provision, and use of 'or modification' in section 8(d)(1), and the statement in the final paragraph of the section that the parties are not required to agree to any modification

effective before the contract may be reopened under its terms, *all seem to contemplate the right of either party to insist on changes in the contract if they have so provided*". (Italics supplied.) S. Rep. No. 986, Pt. 3, 80th Cong. 2d Sess. p. 62.

Again, at 352 U. S. 293, 77 S. Ct. 336, 1 L. Ed. 2d 340, the court said:

"* * * Here the strike occurred at a time when the parties were bargaining over modifications *after notice and in accordance with the terms of the contract*". (Italics supplied.)

Mr. Justice Frankfurter, in his opinion concurring in part and dissenting in part, seems to agree with the interpretation of McLean as to the rule in the Lion Oil Co. case, in that he says (352 U. S. 296, 77 S. Ct. 338, 1 L. Ed. 2d 341):

"The reasoned efforts of the five members of the Board and the three Circuit Judges whose task it has been to apply this proviso to the problem before us—where an *economic strike occurs prior to the contract's termination but pursuant to its reopening provisions and after sixty days' notice*—have produced four distinct interpretations of the Act". (Italics supplied.)

He also relies on a subsequent committee report which stated (352 U. S. 299, 77 S. Ct. 339, 1 L. Ed. 2d 343):

"In order that the parties may better know their rights in the matter, the committee recommends the adoption of the amendments *which would permit a strike or a lock-out after a 60-day notice in support of demands they have anticipated in a reopening clause*".

(Italics supplied.) S. Rep. No. 986, 80th Cong. 2d Sess. p. 63 (1948).

Mr. Justice Frankfurter concludes his opinion by saying (352 U. S. 303, 77 S. Ct. 341, 1 L. Ed. 2d 345):

> "*As the Court's opinion holds, since the union struck more than sixty days after giving notice of its desire to amend and in the course of negotiations pursuant to the contract's reopening clause*, the Court of Appeals erred in setting aside the Board's order on the ground that the strike violated the waiting requirements of §8(d)". (Italics supplied.)

It seems clear that the court dealt only with a contract which, *by its terms*, is subject to reopening or renegotiation prior to its expiration date. Inferentially, at least, it would seem that, if the contract contains no provision for reopening, it is not affected by §8(d). The contract with McLean is specific on this question. It reads:

"Article XII.

"*Effective and Termination Dates*

"This Agreement shall take effect as of July 1, 1957 and shall continue in effect until June 30, 1959, inclusive. This Agreement may be reopened as of July 1, 1959 for changes or modifications herein, or termination hereof, by either party giving sixty (60) days advance written notice to the other of its intent to do so. If neither party reopens this contract as herein provided, it shall automatically be extended from year to year thereafter with like provisions for reopening as of the annual date of July 1.".

Does the claim that the former Hamm's employees con-

stitute a separate bargaining unit preclude the state court from exercising jurisdiction?

It seems to us that before there can be any valid claim that one group of employees may constitute a separate bargaining unit there must be evidence of something which sets that group apart from other employees of the employer, either in the nature of the work they do or something else that distinguishes them from another group. In In re Breman, 93 N. L. R. B., 720, 721, the board said:

> "For a group of employees to constitute an appropriate bargaining unit, such group must be at least a readily identifiable and homogeneous *group apart* from other employees. Because of the interchange here present, these elements are obviously lacking."

Here the record is conclusive that the individuals who were formerly employed by Hamm's, after being employed by McLean, did exactly the same work as those originally employed by McLean. They drove trucks containing mixed loads of various brands of beer, including Hamm's beer. They helped load and unload different brands of beer. Nothing appears from the record that could be said to in any way set them apart in a distinct group, except that they had formerly been employed by Hamm's. The mere fact that they had worked for a different employer is hardly sufficient to constitute them a separate group or bargaining unit.

Respondent union cites and relies on National Labor Relations Board v. Armato (7 Cir.) 199 F. 2d 800, as being analogous to the factual situation we have here. In that case a business owned by one Krantz was sold for bona fide business reasons to Armato. The Krantz organization had a contract with a duly certified union representing

the 25 employees of such employer. After transfer of the business, the new employer, Armato, employed 8 of the original Krantz employees. Armato knew of the existence of the collective-bargaining agreement between the employees and Krantz but refused to meet with the representative of the employees in bargaining for a contract. The National Labor Relations Board issued a cease-and-desist order, which was upheld by the Circuit Court of Appeals on the basis that a mere change in employers *did not operate to destroy the effectiveness of a certification of a union as the bargaining agent for the employees of Krantz*. However, the case did not involve the question that we have involved here. There is no question in the case now before us as to representation. The same union represented the employees of Hamm's as represented the employees of McLean. That this union continues to be the bargaining agent for the employees now that they are employed by McLean is not disputed by anyone. As a result, the Armato case and cases of a similar nature are of no help here. The nature of the case is aptly illustrated by the following language of the court (199 F. 2d 803):

> "The crucial question presented is whether the certification of the union, issued by the Board during Krantz' ownership of the business, continued to be binding on Armato and the subsequently formed corporation. The very nature of a certification of a union as bargaining agent for a group of employees impels the conclusion that a mere change in employers does not operate to destroy the effectiveness of the certification. It is an official pronouncement by the Board that a majority of the employees in a given work unit desire that a particular organization represent them

in their dealings with their employer. There is no reason to believe that the employees will change their attitude merely because the identity of their employer has changed."

But there is a more cogent reason here why the claim that they were entitled to be considered a separate bargaining unit is untenable.

In dealing with a contract between an employer and a union, acting as an exclusive bargaining agent for all employees of such employer, it is necessary to have in mind the nature of such agreement. To begin with, the union acts as the agent for the employees presently employed, and they are as much bound by the contract executed in their behalf by the union as if they had executed it themselves. Where, as here, the contract covers all employees in a designated category and gives to the employer the right to secure and hire new employees after the execution of the contract, such new employees, as they are hired, must be held to have accepted the terms of the contract under which they are employed so as to be bound by it as much as if they were so employed when the contract was executed. In other words, by accepting employment under a contract, they adopt and ratify the terms thereof.[12] They cannot accept employment under the terms of an existing contract and at the same time secretly repudiate it.

Here, the evidence in the record before us is conclusive that the former employees of Hamm's accepted employment from McLean under the terms of the existing contract. The only evidence on this phase of the case to be found in the record is the testimony of McLean. He said:

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[12] *Anson v. Fisher Amusement Corp.*, — Minn. —, 93 N. W. 2d 815, filed December 19, 1958.

"Q. What were the men told as you hired them?

* * * * *

"A. I told the men that they were coming to work for the McLean Distributing Company under a contract that we had with Local 993, and that they were hired under the conditions of the contract existing between the McLean Distributing Company and the Local Union, and they agreed to that.

* * * * *

"Q. Did you have response from any of these men with respect to these terms?

"A. Well, there was some question of some of the conditions, and they were informed what the rate was with our contract with the Union. I am under the impression that there was some different rating between the contract they formerly worked under, and contract they came to work under.

"Q. Did you have a meeting with these new employees on the question of seniority?

"A. No.

"Q. Did you have any group of them together and discuss anything with them?

"A. Yes.

"Q. And when was that?

"A. Well, at the time they were applying for jobs.

"Q. And where was that?

"A. 190 Chestnut in the office.

"Q. How many of these men that you hired were present at such a meeting?

"A. I think there were at that particular time 22 or 24, right along in there.

"Q. Now, did you talk to these men as a group?

"A. Yes, as a group.

"Q. What did you tell them?"

* * * * *

"A. These at the time I informed them that if they were hired they were coming to work under the existing contract between the McLean Distributing Co., and the union, and the question arose at that particular time what the rate was in our contract with the McLean Distributing Co., and I informed them to the best of my knowledge at that time I thought it was $2.80 an hour.

"Q. Was there any discussion of their seniority status?

"A. They were informed at that time that any that did come to work would follow in seniority line behind the men who were presently working at that time with the Distributing Company."

If this had not been true, we assume that respondent union would have attempted to show the contrary. It did not do so. It must follow that these employees either were hired under the terms of the existing contract or they were not hired at all. If they were hired under the contract, they were bound by it, and it must then follow that the strike was in violation of the terms of an express contract.

It is now claimed that McLean has lost the distribution of all products coming from without the state and is no longer engaged in interstate commerce. We have nothing in the record from which we may accept that contention as established fact. As a result, we must proceed on the basis of the stipulation entered into at the start of the case. It may well be that the issues involved in this decision have now become moot. On entertaining jurisdiction, the trial

court will be in a position to delve into that matter. As the case now stands, McLean is entitled to a writ of mandamus commanding the trial court to accept jurisdiction and to proceed to trial and disposition of the case on its merits.

No attempt has been made in this opinion to review the many cases dealing generally with the extent to which a state court may go in granting relief in a case involving a labor controversy in the field of interstate commerce. Instead, the decision is limited to the single question involved, namely, whether, *on the record before us*, the courts of this state may grant injunctive relief to restrain a strike in violation of a no-strike clause in a collective-bargaining contract which contains no provisions for reopening or negotiation prior to its expiration. We have not attempted to pass on the question of whether the state courts have concurrent jurisdiction under §301 of the Labor Management Relations Act (29 U. S. C. A. §185). As far as the record before us is concerned, we do not believe that the relief sought here is within the contemplation of §301. Nor are we unmindful of the many difficulties inherent in a determination of whether a state court may act in a particular area of a controversy in such labor disputes. It would be impossible in an opinion of this kind to adequately discuss the whole subject. The complex nature of the questions involved in determining when and if a state court may act is apparent from any study of the many decisions on the subject. A comprehensive discussion of the problems involved, by Professor Bernard D. Meltzer of the University of Chicago Law School, may be found in Vol. 8, No. 1, of The Law School Record Special Supplement, p. 95, entitled "The Supreme Court, Congress and State Jurisdiction Over Labor Relations."

It might be added that, if the state court finds a violation of *M. S. A.* 179.11 and the court is not precluded from acting under the Federal Labor Management Relations Act, injunctive relief is available under §179.14, in spite of §185.02, the so-called "anti-injunction" act. By the express terms of §179.14, the provisions of §185.02 do not apply to violations of §179.11 and other sections mentioned therein. However, the requirements of §179.14 must be complied with before such injunctive relief may be granted.

Let the writ issue as prayed for.

THOMAS GALLAGHER, (concurring).

I agree that there are areas in labor-management relations in which the state courts retain jurisdiction. Whether the present controversy falls within such an area would seem to be dependent upon the trial court's determination of a number of facts and the conclusions to be drawn therefrom. As the trial develops, the evidence may establish conclusively either that a controversy exists over which the National Labor Relations Board has exclusive jurisdiction; or that it falls within an area from which the state court has not been preempted.

MURPHY, Justice (concurring).

I join in the concurring opinion of Justice Thomas Gallagher.

Peremptory Writ of Mandamus

[Caption omitted]

The State of Minnesota to the Honorable Arthur A. Stewart, one of the Judges of the District Court of Ramsey County, Second Judicial District of Minnesota:

Whereas, upon a consideration of the order to show cause issued herein on December 13, 1958, this court having filed an opinion in said matter on January 23, 1959, directing that a peremptory writ of mandamus issue as prayed for in the moving papers herein;

Now therefore, we being willing that speedy justice should be done in behalf of the relator do command and direct that you immediately after receipt of this writ take jurisdiction of this cause of action and determine the same upon its merits. And you are further directed to make known to us promptly that you shall have executed this writ and have you then and there this writ.

Witness, the Honorable Roger L. Dell, Chief Justice of the Supreme Court aforesaid, and the seal of said court this 18th day of February, 1959.

MAE SHERMAN,
Clerk of Supreme Court.

Supreme Court Seal

APPENDIX C

United States Statutes

The pertinent provisions of the National Labor Relations Act, as amended, are:

1. 61 Stat. 142, 29 U. S. C. Sec. 158 (a) (5) (Vol. 3; p. 4459), §8 (a) (5) of the act:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

2. 61 Stat. 142, 29 U. S. C. Sec. 158 (d) (1) and (4) (Vol. 3, p. 4460, §8 (d) (1), (4). of the Act:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

3. 61 Stat. 143, 29 U. S. C. Sec. 159 (b) (Vol. 3, p. 4461), §9 (b) of the Act:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

4. 61 Stat. 156, 29 U. S. C. Sec. 185 (Vol 3, p. 4471). §301(a), (b) of the Act:

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as

defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

APPENDIX D.

The pertinent provisions of the Minnesota Labor Relations Act are:

1. Minn. Stat., Sec. 179.11 (1) (1957):

"It shall be an unfair labor practice:

"(1) For any employee or labor organization to institute a strike if such strike is a violation of any valid collective agreement between any employer and his employees or labor organization and the employer is, at the time, in good faith complying with the provisions of the agreement, or to violate the terms and conditions of such bargaining agreement."

2. Minn. Stat., Sec. 179.14 (1957):

"When any unfair labor practice is threatened or committed, a suit to enjoin such practice may be maintained in the district court of any county wherein such practice has occurred or is threatened. In any suit to enjoin any of the unfair labor practices set forth in sections 179.11 and 179.12, the provisions of sections 185.02 to 185.19 shall not apply. No court of the state shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of the violation of sections 179.11 and 179.12, as herein defined, except after hearing the testimony of witnesses in open court, with opportunity for cross-examination, in support of the allegations made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court to the effect that the acts set forth in sections 179.11 and 179.12 have been threatened and will be committed unless restrained, or have been committed and will

be continued unless restrained. No temporary restraining order may be issued under the provisions of sections 179.01 to 179.17 except upon the testimony of witnesses produced by the applicant in open court and upon a record being kept of such testimony nor unless the temporary restraining order is returnable within seven days from the time it is granted which shall be noted on the order of the court. It shall be the duty of the court to give the trial or hearing of any suits or proceedings arising under this section precedence over all other civil suits which are ready for trial. Failure of the trial court to decide a motion for a temporary injunction within seven days from the date the hearing thereon is concluded shall dissolve any restraining order issued therein without further order of the court. Failure of the trial court to decide any suit brought under this section within 45 days from the date the trial was ended shall dissolve any restraining order or temporary injunction issued therein without further order of the court."

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 918

BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL NO. 993, JOSEPH A. WAGNER and WADE RUSSELL,

Petitioners,

vs

McLEAN DISTRIBUTING COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Supreme Court of Minnesota

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 918

BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL NO. 993, JOSEPH A. WAGNER and WADE RUSSELL,

Petitioners,

vs

MCLEAN DISTRIBUTING COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Supreme Court of Minnesota

Respondent, McLean Distributing Company, Inc., contends that the decision of the Minnesota Supreme Court is correct and is in accord with the applicable decisions of this Court. It therefore prays that this Court deny the Union's petition for a Writ of Certiorari to review the order and judgment of the Minnesota Supreme Court which granted to respondent a peremptory Writ of Mandamus.

OPINIONS BELOW

The Trial Court's decision consists of findings of fact and conclusions of law, without opinion, and is properly set forth in Appendix A of the union's petition, pp. 14-17. The opinion of the Minnesota Supreme Court is reported in 94 N. W. 2d 514 (1959), and is properly[1] reprinted as Appendix B of the union's petition, pp. 18-43.

JURISDICTION

Respondent concedes that the judgment of the Minnesota Supreme Court granting respondent a Writ of Mandamus is final for the purpose of review by this Court under 28 U.S.C. Section 1257(3). *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U. S. 564, 571, 36 S. Ct. 424, 427, 60 L. Ed. 802; *Davies v. Corbin*, 112 U. S. 36, 40, 5 S. Ct. 4, 28 L. Ed. 627,629; *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869; *American Express Co. v. Michigan*, 177 U. S. 404, 406, 20 S. Ct. 695, 44 L. Ed. 823, 824; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271, 273.

[1]Several inadvertent errors of the Minnesota Supreme Court appear in its decision. In 94 N.W. 2d 514, at 521, footnote 8, the Court quoted the last sentence, instead of the two preceding sentences which were cited to it by respondent, of footnote 2 of the opinion of this Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437, 444, 75 S. Ct. 489, 492, 99 L. Ed. 510, 516. Also, in 94 N.W. 2d 514, at 522, the Minnesota Supreme Court stated that a violation by the union of Section 8(d) of the Act, 61 Stat. 142, 29 U.S.C.A. Section 158(d), would be an "unfair labor practice under Section 8(b)(2);" actually, such violation would be an unfair labor practice under Section 8(b)(3) of the Act, not Section 8(b)(2).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are as follows:

1. 61 Stat. 140, 29 U.S.C. Section 157 (Section 7 of the Act)
2. 61 Stat. 140, 29 U.S.C. Section 158(b)(3) (Section 8 (b)(3) of the Act)
3. 61 Stat. 140, 29 U.S.C. Section 158(d) (Section 8(d) of the Act)
4. 61 Stat. 151, 29 U.S.C. Section 163 (Section 13 of the Act)
5. 61 Stat. 156, 29 U.S.C. Section 185(a) (Section 301 (a) of the Act)

These statutes are set forth as Appendix A to this brief, infra, pp. 25, 26, 27.

The pertinent provisions of the Minnesota Labor Relations Act are properly set forth in the union's petition, Appendix D, pp. 48-49 thereof.

QUESTION PRESENTED

The single question involved in this case is as follows:

Does a state court have jurisdiction to regulate by state law a strike affecting interstate commerce when the strike and picketing is in violation of a no-strike clause in a collective bargaining agreement and constitutes conduct which is neither protected nor prohibited by the National Labor Relations Act?

STATEMENT OF THE CASE

Respondent is in no substantial disagreement with the statement of the case by the union (Petition, pp. 4-7), but for the sake of brevity, as well as completeness, respondent respectfully submits that the statement of the facts in the opinion of the Minnesota Supreme Court, 94 N. W. 2d 514, 515-518, is a full and satisfactory presentation of the facts involved herein. The facts thus stated also appear in the union's petition, pp. 18-24, where the Minnesota Supreme Court's opinion is reprinted.

ARGUMENT

The union's statement of the reasons why this Court should grant the Writ (Petition, pp. 8-12), as well as its attempt at framing the legal issues involved (Petition, p. 3), demonstrates the correctness of the statement of the Minnesota Supreme Court in its opinion below, 94 N. W. 2d 514, at 519, where the Court observed:

> "It seems to us that much of the difficulty in this case arises from the refusal of respondent union to face the real issue before us. * * *"

However, the union does in fact recognize what the actual decision of the Minnesota Supreme Court was, for the union states on page 9 of its petition:

> "The issue directly involved in this case is one not heretofore determined by this Court; i.e., the power of a state court to enjoin a supposed breach of a collective bargaining contract. * * *"

In this connection, the opinion of the Minnesota Supreme Court is very specific as to the precise holding involved herein. The Court stated (94 N. W. 2d 514, at 526):

"No attempt has been made in this opinion to review the many cases dealing generally with the extent to which a state court may go in granting relief in a case involving a labor controversy in the field of interstate commerce. Instead, the decision is limited to the single question involved, namely, whether, *on the record before us*, the courts of this state may grant injunctive relief to restrain a strike in violation of a no-strike clause in a collective-bargaining contract which contains no provisions for reopening or negotiation prior to its expiration. We have not attempted to pass on the question of whether the state courts have concurrent jurisdiction under §301 of the Labor Management Relations Act (29 U.S.C.A. §185). As far as the record before us is concerned, we do not believe that the relief sought here is within the contemplation of §301. * * *" (Emphasis in original)

In view of the precise holding of the Minnesota Supreme Court, and the union's admission that the "issue directly involved in this case" is the power of a state court to enjoin a breach of a collective bargaining contract, respondent respectfully submits that the question before this Court is correctly stated by respondent on page 3, *supra*.[2]

It is the respondent's contention that the decision of the Minnesota Supreme Court is correct and is fully in accord,

[2]The assertion that the Minnesota Supreme Court decided the separate bargaining unit issue as raised below by the union is without merit. Refusing to apply to the National Labor Relations Board for a separate unit determination (T. 29), the union sought to avoid a finding that it breached its contract by asserting that the striking employees were not covered by the contract at all but constituted a separate bargaining unit. (T. 93-94, 105-106, 148) This claim, of course, was insufficient to preclude the Court from deciding that the new employees "were hired under the contract, they were bound by it, and it must follow that the strike was in violation of the terms of an express contract." 94 N.W. 2d 514 at 526.

with the applicable decisions of this Court. This is because Congress, the United States Supreme Court, and the National Labor Relations Board have clearly determined:

(1) That a strike in violation of a collective bargaining contract is not protected concerted activity within the meaning of Sections 7 and 13 of the National Labor Relations Act;

(2) That a strike in violation of a collective bargaining contract is not prohibited as an unfair labor practice by Section 8 of the Act;

(3) That the National Labor Relations Board is not the proper forum to grant remedies for such violations.

In the face of such subsequently demonstrated "compelling precedent applied to essentially undisputed facts," it is certainly permissible for the Minnesota Supreme Court, as it is for this Court, to decide whether the union conduct here involved is subject to state jurisdiction without awaiting a determination of the Board in the first instance. *San Diego Building Trades Council v. Garmon*, — U. S. —, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, 784.

1. The union has claimed on page 9 of its petition that the strike and picketing in violation of its contract would be protected by Section 7 of the National Labor Relations Act. This is demonstrably not the case. This Court, in *NLRB v. Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, dealt with a situation where employees had demanded the right to negotiate changes in an existing collective bargaining agreement. When the company refused to make the changes requested, the employees concertedly refused to work and they were thereupon discharged and replaced. This Court stated (306 U. S. 344, 59 S. Ct. 514):

> "• • • Respondent rightly understood that the men were irrevocably committed not to work in accordance

with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement any more than it prohibits such discharge for a tort committed against the employer."

In commenting upon the *Sands* case, in *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 U. S. 245, 259-260, 69 S. Ct. 516, 524, 93 L. Ed. 651, this Court said that the language of Sections 7 and 13 of the National Labor Relations Act did not make legal a strike "in violation of a contract." This declaration was also recognized by Mr. Justice Murphy in his dissenting opinion, 336 U. S. 269, 69 S. Ct. 527, where he stated, citing the *Sands* case, that:

"We have recognized that the phrase 'concerted activities' does not make every union activity a federal right. We have held that * * * a strike in violation of a contract * * * must be withdrawn from the literal language of Sec. 7."

Furthermore, in its opinion in the *International Union, U.A.W. v. Wisconsin Employment Relations Board* case, *supra*, the Court discussed at length a union contention therein that concerted work stoppages were protected activities under Section 7 and Section 13 of the Act. In holding that Congress had not protected the union conduct which state law had forbidden, and therefore that the conduct was governable by the state or was entirely ungoverned, this Court specifically adverted, 336 U. S. 260, 69 S. Ct. 525, to the report of the House Committee of Conference handling the bill which became the Taft-Hartley Act, H. R. Rep. No.

510, 80th Cong., 1st Sess., p. 38. That report contained the following statements (*ibid.*, p. 15):

> "Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. * * * *Again, in the Scullin Steel case* (65 NLRB 1294) *and in the Dyson case* [72 NLRB 445] *the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the Act,* and refused to reinstate employees discharged for engaging in such activities. * * *
>
> "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and *violation of collective bargaining agreements* from the protection of Sec. 7 were unnecessary." (Emphasis supplied.)

The decisions of the National Labor Relations Board which hold that a strike in violation of an express or implied no-strike clause is a breach of contract and constitutes unprotected activity are clear and convincing. See *American Gilsonite Co.*, 121 NLRB No. 193; *Mid-West Metallic Products, Inc.*, 121 NLRB No. 164; *W. L. Mead, Inc.*, 113 NLRB 1040; *Armstrong Cork Co.*, 112 NLRB 1420; *California Cotton Cooperative Ass'n, Ltd.*, 110 NLRB 1494; *Michigan Lumber Fabricators, Inc.*, 111 NLRB 579; *Wagner Electric Corp.*, 105 NLRB 1; *Cities Service Refining Corp.*, 105 NLRB 797; *Stockham Pipe Fittings Co.*, 84 NLRB 629; *United Elastic Corp.*, 84 NLRB 768.

The reasoning of the Board is well illustrated in *W. L. Mead, Inc.*, 113 NLRB 1040, 1043, where the Board declared:

> "Every encouragement should be given to the making and enforcement of such clauses. But, if employees may

effectively call upon the Board to protect them when they arbitrarily breach clear and binding arbitration clauses of this kind, and turn to the use of economic force for the settlement of grievances rather than to the contractual, quasi-judicial procedure, the effect will be to discourage the making of and the adherence to, contractual arbitration procedures. To hold that a strike in furtherance of such a material breach of a clear and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Courts of Appeals and the Supreme Court." (Citations omitted)

The *Mead* decision of the Board was noted with approval by Chief Judge Magruder in a parallel proceeding arising out of the very same controversy. See *Teamsters, Local* 25 *v. W. L. Mead, Inc.*, 236 F. 2d 576 (1st Cir.), *cert. den.* 352 U. S. 802, 77 S. Ct. 21, 1 L. Ed. 2d 37.

See also *United Construction Workers v. Haislip Baking Co.*, 223 F. 2d 872 (4th Cir.), *cert. den.*, 350 U. S. 847, 76 S. Ct. 87, 100 L. Ed. 754; *NLRB v. Dorsey Trailers, Inc.*, 179 F. 2d 589 (5th Cir.).

With respect to the union's reliance upon *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 76 S. Ct. 349, 100 L. Ed. 309, (Petition, p. 11), see *Mid-West Metallic Products, Inc.*, 121 NLRB No. 164.

2-3. Notwithstanding the fact that the union declares it has not violated any provision of the National Labor Relations Act (Petition, p. 11), the union suggests that if its conduct is not protected it "would appear to be prohibited under Section 8(d)(4)", which conduct would then be an unfair labor practice on its part under Section 8(b)(3) of the Act (Petition, p. 9). As stated before, the Minnesota Supreme Court found that the new employees were

hired under the contract and their strike was in violation of the express terms thereof. 94 N. W. 2d 514, 526.

It is clear from the legislative history of the Taft-Hartley Act and from the decisions of this Court and the National Labor Relations Board that a violation of a collective bargaining agreement is not prohibited as an unfair labor practice under the National Labor Relations Act.

The House of Representatives Conference Report, 80th Cong., 1st Sess., submitted by Mr. Hartley from the Conference Committee, states on pp. 41-42:[3]

> "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board.*" (Emphasis supplied)

This Court, in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, 443 n. 2, 75 S. Ct. 489, 491 n. 2, 99 L. Ed. 510, stated:

> "• • • It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H. R. Conf. Report 510, 80th Cong., 1st Sess., p. 42. • • •"

[3] 1 Legislative History of the Labor Management Relations Act, 1947, pp. 545-546.

Furthermore, the National Labor Relations Board has historically adopted the position that the Board is not the proper forum for the enforcement of collective bargaining agreements, and that their violation does not constitute an unfair labor practice within the purview of the Board's jurisdiction.

Thus, in *United Telephone Company of the West and International Brotherhood of Electrical Workers, Local No. 343 AFL*, 112 NLRB 779, 781, the Board said:

> "* * * Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contract constitute unfair labor practices under the Act.' (Citing cases)
>
> "Nor do we find merit in the contention that the Respondents' failure to arbitrate this dispute constituted a refusal to bargain within the meaning of the Act. The possibility of arbitration was still under consideration when the negotiations were terminated after the Union filed charges with the Board. In any event, the Board does not hold that a failure to arbitrate a dispute is in itself a refusal to bargain in violation of the Act. (Citing cases)
>
> "In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation, and, failing such settlement, to seek judicial enforcement of its construction of the contract. *The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.*" (Emphasis supplied)

The Board then cites and quotes from *Association of Salaried Employees v. Westinghouse Electric Corporation*, *supra*, where this Court stated:

"* * * It is significant, however, that breach of contract is not an 'unfair labor practice.'"

In *Textron Puerto Rico and Textile Workers Union Local 24, 877, ILA-AFL*, 107 NLRB 563, 584, the Board said:

"* * * Thus, the record establishes, at the most, that the Respondent refused to comply with the Union's request that the Respondent submit to arbitration the dispute arising out of that discharge. *Whether or not such refusal constituted a breach of the collective-bargaining agreement, it did not, in itself, constitute a violation of Section* 8(a)(5) *and* (1) *of the Act. Accordingly, we shall dismiss the complaint.*" (Emphasis supplied)

In *Crown Zellerbach Corporation*, 85 NLRB 753, 754, the Board stated:

"The stability of labor relations which the statute seeks to accomplish * * * depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement. By encouraging utilization of such procedures in this case, we believe the statutory policy will best be effectuated. *Affirmative Board action would on the other hand put the Board in the position of policing collective bargaining agreements, a role we are unwilling to assume.*" (Emphasis supplied)

In *Perry Norvell Company*, 80 NLRB 225, 240, the Board, after referring to the legislative history of the Taft-Hartley Act previously quoted, stated:

"From this we also conclude that Congress did not intend to make a strike in breach of a contract an unfair labor practice *per se*." (Emphasis in original)

It is interesting to observe that in two recent decisions the Board attempted to change its opinion and to hold that where the grievance and arbitration provisions of a contract required bargaining during the course of the contract the refusal of one or the other parties to so bargain constituted "bad faith bargaining" which was proscribed by Sections 8(b)(3) and 8(a)(5) of the Act as an unfair labor practice. This, of course, was only where the strike occurred "in a bargaining context." See *International Union, U.M.W., Local No.* 9735 *and Westmoreland Coal Company*, 117 NLRB 1072; and *International Union, U.M.W., Local No.* 2935 *and Boone County Coal Corporation*, 117 NLRB 1095.

In each of these cases the Board has been overruled by the appropriate Court of Appeals. Thus in the *Boone County* case, *supra*, the Court of Appeals for the District of Columbia in *International Union, United Mine Workers of America v. National Labor Relations Board*, 257 F. 2d 211, held that the Board was not justified in treating a violation of a collective bargaining contract as an unfair labor practice. This decision on June 12, 1958, quoted from the legislative history previously mentioned and stated (257 F. 2d 215):

> "The Board has heretofore taken the position that it, the Board, 'is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of its terms.' • • •
>
> "In the face of the legislative history just recited, it would seem that the Board has a heavy burden of persuasion that it does have authority to treat a violation of a term of a collective bargaining contract, even a term providing for the settlement of grievance by arbitration, as an unfair labor practice, and, in effect, decree its specific performance. It will be remembered that the rejected Senate provision expressly named

agreements to submit labor disputes to arbitration as unfair labor practices.

* * * * *

"The Board says, rightly, that a strike in violation of an agreement not to strike is an unprotected labor activity. The Supreme Court of the United States so held long before there was any legal provision for unfair labor practices by Unions, NLRB v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. The Board has frequently so held. See, e.g., W. L. Mead, Inc., 113 NLRB 1040. Employees who strike in violation of such an agreement may be discharged, with impunity. However, to translate their conduct from an unprotected activity to an unfair labor practice one must find justification in the statute."

On June 20, 1958, the same Court set aside the Board's decision in the *Westmoreland Coal Company* case, *supra*. *Local Union No. 9735, U.M.W. v. NLRB*, 258 F. 2d 146. In this case the Board had reasoned that Section 8(d) of the Act required the union to file a sixty-day notice prior to striking where the contract provided for interim bargaining over such questions as seniority and provided for arbitration if the parties could not agree. The Court of Appeals stated (258 F. 2d 149):

"Section 8(d) requires the retention of 'all the terms and conditions' of an existing contract 'without resorting to strike or lock-out' for a period of sixty days after notice to terminate or modify the contract is given. 'Section 8(d) thus seeks, *during this natural renegotiation period*, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation.' Mastro Plastics Corp. v. NLRB, 350 U. S. 270, 286, 76 S. Ct. 349, 359, 100 L. Ed. 309. Section 8(d) does not apply, however, where the attempt is not to modify the terms of an agreement, * * *

but is to obtain an objective which the agreement has not settled. NLRB v. Jacobs Mfg. Co., 2 Cir., 196 F. 2d 680, 683-84." (Emphasis supplied)

The *Boone County* and *Westmoreland* decisions of the Board are closely examined in Cox, "The Duty to Bargain in Good Faith", 71 Harv. L. Rev. 1401, 1437-38, where the author states:

"• • • Even in 1947 Congress was sensitive to the difficulties inherent in efforts to regulate labor's resort to economic weapons. Proposed restrictions upon freedom to strike and picket were sharply debated both in committee and on the floor. Those which were approved were written in section 8(b)(4) in fairly specific language. *Neither slow-downs nor strikes in breach of contract were prohibited.* Section 13 provides that nothing in the act, 'except as specifically provided for herein,' shall be construed to diminish 'the right to strike.' Section 501 of the Labor Management Relations Act, which includes the amended NLRA, defines 'strike' to include 'any concerted slow-down or other concerted interruption of operations by employees.' The Board simply disregarded the implications of these provisions in reading a moral judgment into the amorphous duty to bargain collectively.

"The *Boone County* case illustrates still another danger. The legal system includes a diversity of tribunals each with prescribed functions. *The NLRB has not been assigned the task of policing all unlawful conduct which occurs in the context of a bargaining relation. The Senate bill which emerged from conference as the Taft-Hartley Act would have made it an unfair labor practice 'to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration.* • • • *This provision was deleted by the conference committee on the ground that the enforcement of labor contracts should be left to*

> *the courts.* Since there is nothing in the *Boone County* case distinguishing the UMW's resort to a strike instead of arbitration from any other strike which violates a promise to arbitrate, the decision makes a union unfair labor practice out of conduct which the Congress decided should not be policed by the NLRB. * * *" (Emphasis supplied)

For further evidence of the fact that the National Labor Relations Board is not the proper forum to decide breach of contract questions, but that such issues are to be decided by the courts; see the following decisions which state that courts have jurisdiction over breach of contract issues *even though* the same conduct may also constitute an unfair labor practice which, as such, is solely within the jurisdiction of the Board: *Reed v. Fawick Airflex Co.*, 86 F. Supp. 822, 823-824 (N. D. Ohio, E. D.); *Textile Workers Union of America v. Arista Mills Co.*, 193 F. 2d 529, 533-534 (4th Cir.); *Lodge No. 12, District No. 37, I.A.M. v. Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir.), *cert. den.* — U. S. —, 79 S. Ct. 120, 3 L. Ed. 2d 110; *United Electrical, R. & M. Workers v. Worthington Corp.*, 236 F. 2d 364 (1st Cir.); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F. 2d 401 (3rd Cir.); *Plumbers & Steamfitters Union, Local No. 598 v. Dillion*, 255 F. 2d 820, 823 (9th Cir.); *Local 19, Warehouse, Etc. v. Buckeye Cotton Oil Co.*, 236 F. 2d 776, 783 (6th Cir.); Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 727-728; Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 Col. L. Rev. 52.

To repeat, the union admits no federal unfair labor practices. It does not contend, as unions have sometimes

contended, that it has refused to bargain in violation of Section 8(b)(3) of the Act. In fact, just to the contrary, the union's contention is that it has demanded to bargain and is ready and willing to bargain. It is the respondent which has refused to bargain and respondent justifies that refusal upon the provisions of its contract and upon the express language of Section 8(d) of the Act, which states:

> "The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *"

See also *United Elastic Corp.*, 84 NLRB 768.

It is of passing interest to note that the Regional Director of the National Labor Relations Board has dismissed this union's charge that respondent has refused to bargain in violation of Section 8(a)(5) of the Act. See Appendix B, page 29, 30, *infra*. This union's appeal from that decision was also dismissed. See Appendix C, page 31, *infra*. Respondent assumes that this Court will take judicial notice of the determinations of the Board insofar as such decisions relate to allegations contained in the union's petition herein.

It is now well established that the provisions of Section 8(d) are applicable only when a contract has been reopened for modification or terminated for renegotiation. *NLRB v. Lion Oil Co.*, 352 U. S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331. In that case, this Court quoted the provision of Section 8(d) cited immediately above and relied on by respondent, and stated (352 U. S. 290, 77 S. Ct. 335):

"The negative implication seems clear: Congress recognized a duty to bargain over modifications *when the contract itself contemplates such bargaining* * * *." (Emphasis supplied)

Section 8(d) of the National Labor Relations Act is simply a corollary of the unfair labor practices defined in Section 8(a)(5) and Section 8(b)(3), which impose upon employers and unions a duty to bargain. Section 8(d) defines the duty to bargain and prescribes certain procedures which must be followed in order to carry out that duty in good faith. The failure to comply with these procedures may properly be described as unfair practices in connection with the duty to bargain. On the other hand, Section 8(d) specifically provides, in reference to attempts by one party to modify a fixed term contract before its expiration date, that there is no duty to bargain during the unexpired term of such contract, and specifically provides that concerted activity (strikes and picketing) during such time is not protected. The fact that such activities are not protected, however, does not make them unfair labor practices nor impose the penalities for unfair labor practices upon those conducting the activity, since the bargaining procedures are not then applicable.

On page 10 of its petition the union states that this Court has also "recognized the intent of Congress to enforce no-strike provisions by providing a federal forum and a federal substantive law for the enforcement of agreements to arbitrate" under Section 301 of the Act. *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U. S. 448 77 S. Ct. 912, 1 L. Ed. 2d 972, is cited in support of this proposition.

But *Lincoln Mills* did not preempt state courts from granting relief to a party injured by a breach of a collective bargaining contract; that case held that Section 301 of the Act gives federal district courts power to decree specific performance of collectively bargained agreements to arbitrate and furnishes a body of federal substantive law for the courts to apply in enforcing such agreements.

To interpret the *Lincoln Mills* decision as holding that Section 301 preempts state courts from granting injunctive relief against a union which willfully violates a no-strike clause in its contract would be to grant unions the very immunity from contractual responsibility which Section 301 was designed to cure. It is one thing to bring an action under Section 301 in the federal courts to obtain specific enforcement of an agreement to arbitrate when one party refuses to do so. It is a completely different matter, however, when a union with a potential grievance utterly fails to utilize the grievance and arbitration machinery, as it agreed by contract to do, and strikes the employer instead. In the instant case, respondent was never even *requested* to arbitrate; in *Lincoln Mills*, the employer *refused* to arbitrate after the union requested it to do so pursuant to its contractual agreement.

The union's concern for uniformity in labor disputes is really based on the knowledge that under Section 301 an injunction will not lie to restrain a breach of a no-strike clause because the Norris-LaGuardia Act prevents the federal courts from granting such relief. See *A. H. Bull Steamship Co. v. Seafarers' International Union*, 250 F. 2d 326 (2nd Cir.), *cert. den.* 355 U. S. 932; *Alcoa Steamship Co. v. McMahon*, 173 F. 2d 567 (2nd Cir.), *cert. den.* 338 U. S. 821; *W. L. Mead, Inc. v. Teamsters Local* 25, 217 F. 2d 6

(1st Cir.); *Local* 205 *U.E. v. General Electric Co.*, 233 F. 2d 85 (1st Cir.), affirmed 353 U. S. 547.

On the question of concurrent jurisdiction and especially the matter of a difference in remedies in breach of contract cases, see *McCarroll v. Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 Pac. 2d 322, *cert. den.* 355 U. S. 932, 78 S. Ct. 413, 2 L. Ed. 2d 415. This Court observed in the second *Garmon* case, *supra*, that "• • • judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, *rather than on the method of regulation adopted.* • • •" 3 L. Ed. 2d 782.

Indeed, numerous cases have held that Section 301 does not preempt state court jurisdiction in breach of contract cases and state courts may grant injunctive relief for such contract violations. See *McCarroll v. Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 Pac. 2d 322, *cert. den.* 355 U. S. 932, 78 S.Ct. 413, 2 L.Ed. 2d 415; *General Building Contractors' Assn. v. Local Union No.* 542, 370 Pa. 73, 87 Atl. 2d 250, 32 A.L.R. 2d 822; *General Electric Co. v. Int'l Union, U.A.W.*, 93 Ohio App. 139, 108 N. E. 2d 211, *appeal dismissed* 110 N. E. 2d 424; *Philadelphia Marine Trade Assn. v. International Longshoremens' Local Union No.* 1291, 382 Pa. 326, 115 Atl. 2d 733, *cert. den.* 350 U. S. 843, 76 S. Ct. 84, 100 L. Ed. 751; *Anchor Motor Freight v. Local* 445, *I.B.T.*, 171 N. Y. S. 2d 506, affirmed 5 App. Div. 2d 869. Note also *Associated Tel. Co. v. Communication Workers of America, C.I.O.*, 114 F. Supp. 334, 341 (S. D. Cal.) and *Castle & Cooke Terminals v. Local* 137 *I.L.W.*, 110 F. Supp. 247, 250 (D. C. Hawaii).

Additional Reasons for Denying the Petition

As a further reason why this Court should not grant the union's petition herein, respondent cites Article V, paragraph No. 4, of its complaint (T. 3) as indicating that unlawful threats of reprisal are involved in this case. (T. 118-143) Notwithstanding the precise holding of the Minnesota Supreme Court, the concurring opinions of Justices Gallagher and Murphy, 94 N. W. 2d at 526-527, indicate that there were other issues involved in the case below which might very well govern the State Court's determination that it had jurisdiction. See International Assn. of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018.

Furthermore, as far as the parties to this controversy are concerned it would appear that the injury caused by the breach will become moot, because the contract by its terms expires on June 30, 1959.

Furthermore, in Article V, paragraph No. 5 of its complaint below (T. 4), respondent invoked Minnesota Statutes 1957, Sec. 179.11(4), which states in effect that it is a state unfair labor practice for a majority of pickets not to be employees of the employer being picketed. This issue of "stranger picketing" would require decision by the trial court upon remand to it for a determination on the merits. See *International Brotherhood of Teamsters, Local 695, A. F. L. v. Vogt, Inc.*, 354 U. S. 289, 77 S. Ct. 1166, 1 L. Ed. 2d 1347, *reh. den.* 354 U. S. 945, 77 S. Ct. 1423, 1 L. Ed. 2d 1558; *Dougherty v. Commonwealth*, 106 S. E. 2d 754 (Va. 1957).

CONCLUSION

The union has stated that it sees "no reason why" the National Labor Relations Act should not regulate conduct which involves violations of no-strike provisions in a collective bargaining contract (Petition, p. 12). Respondent submits that the authorities discussed above conclusively establish the reason why the rule is different from that urged by the union. To repeat, in view of the clear determination of the National Labor Relations Board that the union conduct here involved is neither protected nor prohibited, and in view of the "compelling precedent" of the foregoing authorities, the Minnesota Supreme Court was correct in granting a writ of mandamus commanding the trial court to take jurisdiction of this controversy and to determine it on the merits. *San Diego Building Trades Council v. Garmon*, — U. S. —, 79 S. Ct. 773, 780, 3 L. Ed. 20 775, 784.

Respondent therefore prays that this Court deny the Union's Petition.

Respectfully submitted,

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St. Paul 2, Minnesota
Counsel for Respondent

Of Counsel
MANDT TORRISON and
JAMES C. O'NEILL
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St. Paul 2, Minnesota

APPENDIX A

United States Statutes

The pertinent provisions of the National Labor Relations Act, as amended, are as follows:

1. 61 Stat. 140, 29 U.S.C. Section 157, Section 7 of the Act.

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

2. 61 Stat. 140, 29 U.S.C. Section 158(b)(3), Section 8(b)(3) of the Act.

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);"

3. 61 Stat. 140, 29 U. S. C. Section 158(d), Section 8(d) of the Act.

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * * * *

(4) continues in full force and effect without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall * * * not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer."

4. 61 Stat. 151, 29 U.S.C. Section 163, Section 13 of the Act.

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

5. 61 Stat. 156, 29 U.S.C. Section 185(a), Section 301 (a) of the Act.

"Sec. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
EIGHTEENTH REGION
601 Metropolitan Building
Minneapolis 1, Minnesota

February 19, 1959

International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers
of America, Local 993
320 University Avenue
St. Paul, Minnesota

Re: McLEAN DISTRIBUTING COMPANY, INC.
Case No. 18-CA-1016

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,
C. EDWARD KNAPP
Regional Director

Certified Mail, R R R
Cc: See Page 2

McLEAN DISTRIBUTING COMPANY, INC., 18-CA-1016
2-19-59

Cc: Robins, Davis & Lyons
Attorneys at Law
1130 Minnesota Building
St. Paul 1, Minnesota
Attention: Mr. Erwin A. Peterson
Attorney

McLean Distributing Company, Inc.
190 Chestnut Street
St. Paul 2, Minnesota

Bundlie, Kelley and Maun
Attorneys at Law
425 Hamm Building
St. Paul 2, Minnesota
Attention: Mr. Mandt Torrison
Attorney

General Counsel
National Labor Relations Board
Washington 25, D. C.

erb

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington 25, D. C. April 22, 1959

Erwin A. Peterson, Esquire
Robins, Davis & Lyons
1130 Minnesota Building
St. Paul 1, Minnesota

Re: McLean Distributing Company, Inc.
Case No. 18-CA-1016

Dear Mr. Peterson:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations of Section 8 (a) (1), (3) and (5) of the National Labor Relations Act, has been duly considered by the General Counsel.

The General Counsel sustains the ruling of the Regional Director. Like the Director, the General Counsel concludes that there is insufficient evidence of violations to warrant further proceedings.

Very truly yours,
THOMAS J. RYAN
Special Assistant to the
General Counsel

cc: Director, 18th Region
Intl. Bro. of Teamsters et al, Local 993, 320 University Avenue, St. Paul, Minnesota.
McLean Distributing Co., Inc., 190 Chestnut St., St. Paul, Minnesota.
Bundlie, Kelley and Maun, 425 Hamm Building, St. Paul 2, Minnesota,
Attn: Mr. Mandt Torrison, Esq.
CERTIFIED MAIL

FILE COPY

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JAMES R. BROWNING, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 918

BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL No. 993, JOSEPH A. WAGNER AND WADE RUSSELL,

Petitioners,

vs.

McLEAN DISTRIBUTING COMPANY, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Minnesota

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Petitioners

vs.

MCLEAN DISTRIBUTING COMPANY, INC.

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Minnesota

The only new matters in respondent's brief are found at page 22. Petitioners' answer to these new matters are as follows:

1. There is no evidence in the present controversy of reprisals, threats of reprisals, violence or the like. The trial

court in this case did not find any evidence of reprisals or threats of reprisals (T. 24-27), and the Minnesota Supreme Court, as respondent admits, did not directly or impliedly make any holding on the basis of reprisals or threats of reprisals. Our case is therefore similar to *Hotel Employees Union, Local No. 255 v. Sax Enterprises, Inc.*, — U.S. —, 3 L. Ed. 2d 289 (1959), in which this Court decided the case on the merits notwithstanding an allegation of violence in the state trial court.

2. The present controversy is not moot because:

(a) The petitioning union claims that it is entitled to strike to obtain a separate bargaining unit and that the National Labor Relations Board has exclusive authority to determine that question. But the state court held that it had the power to determine that issue. The question of the Minnesota Supreme Court's power to so declare is independent of the contract and is not moot.

(b) The status of the former employees of respondent who were discharged by it by reason of this strike is dependent upon determination of the state court's power to act in the instant case.

(c) Minn. Stat. § 585.04 requires a bond for damages to the party enjoined if the court finally determines that the temporary injunction should not have been issued. Such damages include monetary loss and attorneys' fees. *Detroit Lakes Realty Co. v. McKenzie*, 204 Minn. 490, 284 N.W. 60 (1939). Petitioners' right to recover those items of damage are dependent upon the outcome of this case. This is therefore a continuing controversy. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459 (1957) (case not moot because of possible monetary loss); *Springstead v. Crawfordsville*

State Bank, 231 U.S. 541, 542 (1913) (attorneys' fees considered as monetary loss).

(d) Any wrongful discharge action at common law by members of the petitioning union will hinge on the state court's power to act in the present case.

3. The issue of stranger picketing is not in the present controversy since neither the trial court nor the Minnesota Supreme Court mentioned the presence of same.

Respectfully submitted,

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